FOR ARGUMENT

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*

Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*

Appellees.

On Appeal from the United States
District Court for the District of Columbia

Joint Brief on the Merits of Appellees Emily Echols and Barret Austin O'Brock, *et al.*, Urging Affirmance of the Judgment that BCRA Section 318 is Unconstitutional (FINAL VERSION)

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APPELLEES' COUNTER-STATEMENT OF QUESTION PRESENTED

Prior to the effective date of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, minors had the right to contribute to the committees of political parties and to candidates for federal office, subject to the same limitations that also applied to persons who had attained their majority. Section 318 of BCRA completely prohibits donations to committees and to candidates by minors. In the view of these Appellees, all of whom are minors, the question presented is:

> Whether the three judge district court erred in its judgment that the absolute ban on donations by minors was unconstitutional?

PARTIES

These Appellees incorporate by reference the listing of the parties set out in the Jurisdictional Statement of the FEC, *et al.*, at II-IV. In addition to the Appellees listed on the cover, this brief is joined by Appellees Daniel Solid, Hannah and Isaac McDow, Jessica Mitchell, and Zachary White.

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GLOSSARY

BCRA:	Bipartisan Campaign Reform Act
FECA:	Federal Election Campaign Act
FEC:	Federal Election Commission
FEC JS:	Jurisdictional Statement of the FEC, *et al.*
FEC Resp.:	FEC Response to Joint Motion to Affirm Summarily
JA:	Joint Appendix
Supp. App.:	Supplemental Appendix

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Joint Brief on the Merits of Appellees Emily Echols and Barret Austin O'Brock, *et al.*, Urging Affirmance of the Judgment that BCRA Section 318 is Unconstitutional

The minor Appellees, by their next friends, urge this Court to affirm the judgment of the three judge court of the United States District Court for the District of Columbia that Section 318 of BCRA is unconstitutional.

CITATIONS TO THE DECISION BELOW

The decision below is published at 2003 U.S. District Lexis 7912 (D.D.C. May 2, 2003), and is available on the website of the United States District Court at http://www.dcd.uscourts.gov/mcconnell-2002-ruling.html. As directed by this Court, the Appellants in the consolidated cases have filed a four-volume Supplemental Appendix to Jurisdictional Statement, in which are reproduced the four opinions of the three judge panel below.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

The relevant constitutional provisions, statutes and

regulations are set out in the appendix to the FEC's Jurisdictional Statement. *See* FEC JS at 1-2 (and appendix pages cited).

STATEMENT OF THE CASE

1. Course of Proceedings

Following the enactment by Congress of BCRA, and its signature into law by President Bush, more than six dozen individuals and organizations filed suits challenging the constitutionality of the Act.[1] Section 403 of BCRA required the District Court to expedite its consideration of challenges to the constitutionality of BCRA. In keeping with that requirement, the three-judge district court consolidated the suits and imposed an expedited schedule for discovery and trial.[2]

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1. The lawsuits, in order of their filing, were: *NRA v. FEC*, No. 02-cv-581 (D.D.C. filed Mar. 27, 2002); *McConnell v. FEC*, No. 02-cv-582 (D.D.C. filed Mar. 27, 2002); *Echols v. FEC*, No. 02-cv-633(D.D.C. filed Apr. 4, 2002); *Chamber of Commerce v. FEC*, No. 02-cv-751 (D.D.C. filed Apr. 22, 2002); *National Association of Broadcasters v. FEC*, No. 02-cv-753(D.D.C. filed Apr. 22, 2002); *American Federation of Labor v. FEC*, No. 02-cv-754 (D.D.C. filed Apr. 22, 2002); *Paul v. FEC*, No. 02-cv-781 (D.D.C. filed Apr. 23, 2002); *Republican National Committee v. FEC*, No. 02-cv-874 (D.D.C. filed May 7, 2002); *California Democratic Party v. FEC*, No. 02-cv-875 (D.D.C. filed May 7, 2002); *Adams v. FEC*, No. 02-cv-877 (D.D.C. filed May 7, 2002); *Thompson v. FEC*, No. 02-cv-881 (D.D.C. filed May 7, 2002).

2. *See* Order (D.D.C. Apr. 24, 2002) (consolidating cases), JA 1655-58; Order (D.D.C. May 13, 2002) (consolidating subsequently filed cases), JA 1661-64; Order (D.D.C. Apr. 24, 2002) (discovery schedule), JA 1659-60; Order (D.D.C. July 26, 2002) (amending discovery schedule), JA 1691-93; Order (D.D.C. Oct. 15, 2002) (briefing schedule), JA 1802-06; Order (D.D.C. Nov. 15, 2002) (setting oral argument), JA 1807-08; Order (D.D.C. Nov. 26, 2002) (setting schedule for oral argument), JA 1809-11.

2. Decision Below

A. *The Judgment Below*

All three judges below concluded that Section 318 violates the Constitution:

> Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional. Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Per Curiam Op. at 11; Supp. App. 9sa.

B. *The Opinions of the Judges Below*

(1) Judge Henderson

Judge Henderson concluded that whether analyzed under strict scrutiny or under "*Buckley* scrutiny," Section 318 was unconstitutional. Supp. App. 462sa (concluding that, because Section 318 failed scrutiny under the less strict standard of *Buckley*, it was unnecessary to decide whether strict scrutiny applied to it). In Judge Henderson's view, the Appellants' arguments for the constitutionality of Section 318 failed for two principal reasons:

> First, section 318 does not serve any governmental interest, much less a "sufficiently important" or

"compelling" one.

* * * *

> Second, even if section 318 served to prevent actual or apparent corruption of federal candidates in a material way not served by existing law, the provision could not be sustained because—far from being "closely drawn" or "narrowly tailored"—it is grossly overbroad.

Supp. App. 462sa, 465sa. In addition, Judge Henderson found that the evidence proffered to justify Section 318 as a tool to prevent corruption to be "remarkably thin." Supp. App. 463sa.

(2) Judge Kollar-Kotelly

Judge Kollar-Kotelly, like Judge Henderson, found it unnecessary to decide between strict scrutiny or "*Buckley* scrutiny." In Judge Kollar-Kotelly's view, "Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important government interest." Supp. App. 1009sa. *See also* Supp. App. 1010sa ("the evidence presented is insufficient to support government action that abridges constitutional freedoms").

(3) Judge Leon

Judge Leon, while concurring in the conclusion of Judges Henderson and Kollar-Kotelly that Section 318 was unconstitutional, wrote "only to explain why [he] believe[d] th[e] Court should evaluate this provision under the strict-scrutiny standard of review." Supp. App. 1177sa.

3. **Statement of Relevant Facts**

A. *Prior to Enactment of BCRA, Both So-Called "Conduit" Contributions and Excess Contributions Violated Existing Provisions of FECA*

FECA directly prohibits any person from making political contributions in the name of any other person. Title 2 U.S.C. § 441f (2002). That prohibition encompasses every contribution made in the name of another, including those made by a parent in the name of their minor child. FECA also directly prohibits any person from exceeding the maximum permitted political contribution. 2 U.S.C. § 441a. That limitation prevents the parent or guardian of a minor child from exceeding limitations on contributions by the ruse of donating in the name of their minor child. Thus, prior to the enactment of BCRA, federal law already prohibited circumventing campaign limits by making gifts in the names of children.

B. *Prior to the Enactment of BCRA, The FEC Had Limited Experience with Parental Conduit Giving, and Resolved Those Instances It Has Reported*

No evidence suggested the need for Section 318.

In fulfillment of its statutory enforcement responsibilities, the FEC has investigated only the barest handful of instances of parental donations in the names of minor children.[3] The FEC has acknowledged that one

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3. Judge Kollar-Kotelly summarized the FEC's regulatory enforcement experience in this area. *See* Supp. App. 772sa, 773sa-

percent or fewer of its investigatory "Matters Under Review" "involved covered political contributions by minors or by parents made in the name of the minor children."[4]

C. *The FEC Has Recommended Narrow Statutory Adjustments to Congress to Address the Potential of Conduit Giving By Parents but not a Complete Prohibition on Political Contributions by Minors*

The FEC proposed to Congress that it adopt legislation related to contributions by minors to federal candidates and committees of political parties. The FEC has submitted Annual Reports to Congress and to the President as required by law. Those Reports provide information about the regulatory and enforcement activities of the Commission, and they also communicate proposals for legislative action. In its 1992 Annual Report, the FEC recommended that Congress establish a minimum, but unspecified, age for contributors.[5] In support of that recommendation, the FEC stated:

> The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

774sa (findings of fact ¶¶ 3.5 and 3.8 (including subparts thereof)).

4. *See* JA 1767 (FEC Responses to Requests to Admit, ¶ 64).

5. *See* 1992 Annual Report at 64; JA 1868.

Id.

In each of its Annual Reports for the years 1993-98, the FEC recommended that Congress establish a presumption that contributors below age 16 are not making contributions on their own behalf.[6] In its 1999 and 2000 Annual Reports, the FEC recommended that Congress establish a minimum age of 16 for making contributions.[7] Regarding this proposal, the FEC stated:

> The Commission has found that contributions are sometimes given by parents in their children's names. Congress should address this potential abuse by establishing a minimum age of 16 for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another.

Id.

D. *BCRA Section 318*

BCRA incorporates no factual findings about problems related to donations by minors to the committees of political parties or to candidates. Section 318 was added to the Act while the proposal was pending in the House. No explanation for the provision was offered during debate there.[8] The only explanation offered for the ban

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6. *See, e.g.*, 1993 Annual Report at 50, JA 1869.

7. *See* 1999 Annual Report at 50, JA 1875; 2000 Annual Report at 43, JA 1876.

8. The FEC acknowledged below the absence of any explanation related to this provision in the House debates on

came during the Senate debate on the Act.[9] There, Senator John McCain stated that the ban was needed to address the problem of parental circumvention of donation limitations by giving contributions in the names of their minor children.[10]

Section 318, which amends FECA by adding to it a new section 324, prohibits anyone seventeen years of age or younger from making any contribution to a candidate, or a contribution or donation to a national or state political party committee:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution to a committee of a political party.

See Title III, § 318, H.R. 2356, 107th Cong. (2002) (enacted), (FEC Jurisdictional Statement at 71a).

E. *The Minors in Echols and in McConnell*

Emily Echols, Daniel Solid, Hannah and Isaac McDow, Jessica Mitchell, and Zachary White are citizens of the United States. Echols, Solid and White reside in Georgia, the McDows reside in Alabama, and Mitchell resides in Florida. Each of them is aged seventeen years or

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BCRA. *See* JA 1755-56 (FEC Responses to Requests to Admit, ¶ 18).

9. *See* 148 Cong. Rec. S2145-46 (daily ed. March 20, 2002) (statement of Sen. McCain).

10. *See* 148 Cong. Rec. S2145-48 (daily ed. March 20, 2002) (statement of Sen. McCain).

younger.[11]

These Appellees are seriously interested in government, politics, and campaigning. They demonstrate that interest by participating in campaigns as volunteers, assembling signs, distributing literature, walking precincts, even traveling great distances to campaign door-to-door for candidates they support. In doing so, they have shown their commitment to using their rights to freedom of association and expression to effect political changes in accord with their beliefs and opinions.[12]

These minors possess funds that they have earned – either by working outside their homes or by performing chores around their homes for pay – or that they received as gifts. No portion of these funds consists of monies given to them for the purpose of making political contributions. The parents of the Echols plaintiffs are aware of the federal campaign laws and the restrictions

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11. *See* JA 212, Declaration of Emily Echols, ¶¶ 1-2,5; JA 819, Declaration of Daniel Solid, ¶¶ 1-2,5; JA 408, Declaration of Hannah McDow, ¶¶ 1-2,5; JA 412, Declaration of Isaac McDow, ¶¶ 1-2, 5; JA 582, Declaration of Jessica Mitchell, ¶¶ 1-2; JA 831, Declaration of Zachary White, ¶¶ 1-2, 5.

12. *See* JA 213, Declaration of Emily Echols, ¶¶ 11-13; JA 820, Declaration of Daniel Solid, ¶¶ 11-13; JA 409, Declaration of Hannah McDow, ¶¶ 11-13; JA 413, Declaration of Isaac McDow, ¶ 11; JA 583-84, Declaration of Jessica Mitchell, ¶ 9; JA 832-33, Declaration of Zachary White, ¶¶ 11,13.

they impose; and they have obeyed those laws.[13]

Jessica Mitchell and Zachary White have previously donated to candidates for office.[14] For them, and for each of these young citizens, contributing money to candidates and to the committees of political parties are forms of expression of support for those candidates and committees. Moreover, by making such contributions of money, they have already associated with those selected candidates and committees of political parties. The minors Appellees plan to, and intend to, exercise their rights of political association and expression by making candidate and committee contributions, during their minority, into the future. But for the enactment of Section 318 and its ban on such political contributions by them, they would be free

13. *See* JA 215, Declaration of Emily Echols, ¶¶ 27-32; JA 821-22, Declaration of Daniel Solid, ¶¶ 24-27; JA 411, Declaration of Hannah McDow, ¶¶ 24-26; JA 414-15, Declaration of Isaac McDow, ¶¶ 23-25; JA 585-87, Declaration of Jessica Mitchell, ¶¶ 15, 21-22; JA 834, Declaration of Zachary White, ¶ 27; JA 217, 220, Declaration of Tim Echols, ¶¶ 10,11,20; JA 817, Declaration of Bonnie Solid, ¶¶ 9-11; JA 409, Declaration of Donna McDow, ¶¶ 11-13; JA 589, Declaration of Pamela Mitchell, ¶¶ 18-20; JA 832-33, Declaration of Cynthia White, ¶¶ 11-13.

14. *See* JA 584, Declaration of Jessica Mitchell, ¶ 9(k); JA 833, Declaration of Zachary White, ¶ 13(g).

to do so.[15]

Appellee Barret Austin O'Brock is a minor living in Louisiana.[16] He declared his general intention to contribute to federal candidates in future elections, including in the 2002 and 2004 election.[17] Specifically, he stated his intention to contribute at least $20 of his own money (not received from any other person for purposes of the contribution) to John Milkovich, a candidate for U.S. Representative for the Fourth Congressional District of Louisiana, prior to the November 2002 general election.[18] Barret knows candidate Milkovich personally because the candidate was Barret's Sunday School teacher for two years.[19]

SUMMARY OF ARGUMENT

The day is long past when America's teenagers and children may be consigned to constitutional steerage, there to "enjoy" all the benefits of third class citizenship. As

15. *See* JA 214-16, Declaration of Emily Echols, ¶¶ 18-36; JA 820-22, Declaration of Daniel Solid, ¶¶ 17-28; JA 409-11, Declaration of Hannah McDow, ¶¶ 16-27; JA 413-15, Declaration of Isaac McDow, ¶¶ 14-26; JA 584-86, Declaration of Jessica Mitchell, ¶¶ 11-22; JA 833-34, Declaration of Zachary White, ¶¶ 15-27.

16. *See* Declaration of Barret Austin O'Brock, ¶¶ 1, 2.

17. *See id.*, ¶¶ 3, 6.

18. *See id.*, ¶ 4.

19. *See id.*, ¶ 5.

early as *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), it has been without question that American children are "whole persons" in the constitutional sense. Concomitantly, they possess the same constitutional rights and liberties as adults, even if, in certain circumstances, such as the special case of public schools, the contours of those rights vary slightly from the rights of their adult counterparts. *See Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Nonetheless, in a stunning strike against those rights, Congress enacted the complete ban embodied in Section 318. The House of Representatives adopted that new provision without explanation. In the Senate, only Senator McCain offered any explanation, one that was abbreviated at best. This new provision of federal law, as Judge Henderson observed, "falls into the category of 'who knows where it came from.'" *See* Supp. App. at 461sa.

All three of the judges below agreed that Section 318 was unconstitutional. A majority – Judges Henderson and Kollar-Kotelly – agreed that it was unnecessary to decide whether a more stringent standard of review applied because of the flagrant unconstitutionality of the flat ban. Judge Leon did not disagree with that view, but instead focused on the reasons for applying strict scrutiny to Section 318.

The flat ban on political donations by minors flouts several constitutional norms relevant to laws affecting associational freedoms and expression. As this Court instructed in *Buckley v. Valeo*, 424 U.S. 1, 16-18 (1976), Section 318 must be subjected to something more than the

scrutiny embodied in *United States v. O'Brien*, or the time, place and manner analysis employed in the Public Forum cases, e.g., *United States v. Grace*, 461 U.S. 171 (1983).

The court below correctly concluded that it could not withstand such scrutiny. As an initial matter, the breadth of Section 318 is extreme. Under it, a 17 year old working as a church secretary or attending basic training at the Marine Corps Recruit Depot at Paris Island are lumped in with infants and toddlers and treated like babies. Likewise, because it bars *all* minor citizens from making political contributions, Section 318 lumps hard-working young people whose industry and thrift enables them to make small contributions, perhaps five dollars at a time, into the specially burdened category of persons less than 18 years of age, there to suffer the diminution of their constitutional rights along with a very few children whose parents have violated existing laws and were caught in the FEC's pre-existing regulatory net.

The ban is severely flawed. It is not drawn in service of a sufficiently important government interest. Even assuming arguendo such a justification for Congress to act, the ban on political contributions by minors is not drawn narrowly in service of the government interests at stake. In these respects, the judgment below and the opinions of Judges Henderson and Kollar-Kotelly comport entirely with this Court's recent decision in *FEC v. Beaumont*, 2003 U.S. Lexis 4595 (June 16, 2003).

The Government seeks support for the complete ban on contributions by minors by resorting to the fact that gifts by minors are *voidable*. That voidability, the Government

intimates, bears significance in the analysis of Section 318. The Government's approach is "uncommonly silly," *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). It cannot be squared with the Constitution, which this Court has frequently construed to protect the right to hold opinions and the right to change one's opinions. Nor can the Government's approach be squared with American political history, riddled as that history is with indicia of the "voidability" of party affiliations and candidate endorsements.

ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court subjected the Federal Election Campaign Act of 1971 and certain Internal Revenue Service regulations to constitutional scrutiny. *Buckley* affirmed the constitutionality of a *cap* on the amount of money that any person may contribute to any candidate for federal office, the candidate's authorized political committee, or the authorized committees of political parties. 424 U.S. at 29. In doing so, this Court acknowledged that contributing money to a candidate or the committee of a political party is an exercise of fundamental rights protected by the First Amendment:

> *The Act's contribution* and expenditure *limitations operate in an area of the most fundamental First Amendment activities*. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.

424 U.S. at 14 (emphasis added).

To be sure, expressive and associational aspects of *contributions* have been accorded different levels of examination by this Court than used in analyzing expenditure limitations, *see Buckley*, 424 U.S. at 20-21, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000), *FEC v. Beaumont*, 2003 U.S. Lexis 4595, *29-*30 (June 16, 2003). Nevertheless, the constitutional dimensions of political contributions have compelled this Court to scrutinize closely restrictions affecting the right to make those contributions. *See, e.g., Buckley*, 424 U.S. at 25.

Here, Congress has entirely abrogated the right of citizens of the United States, solely by reason of their age, to contribute money to federal candidates and the committees of political parties. *See* BCRA § 318. In doing so, Congress has denied to all minor citizens their right to political expression and to political association through the act of making contributions, even in token, nominal amounts. Unlike *Buckley*, in which this Court upheld a *donation cap*, the present case addresses an "*absolute ban* on campaign contributions," FEC Resp. at 9 n.4 (emphasis added). As *Buckley* intimates, the difference between a cap on donations and a ban of them is not a mere distinction without a difference. 424 U.S. at 21-22, 28. That difference here lends substantial support to the judgment below.

I. SECTION 318 VIOLATES MINORS' CONSTITUTIONAL RIGHTS

As a matter of first principles, a complete ban on political contributions strikes directly at the heart of the First Amendment. As this Court explained, in addressing

statutory ceilings on the amount of personal contributions: "The Act's contribution *and* expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14 (emphasis added). Nothing in *Buckley* or its progeny suggests that the injury of such a flat prohibition on even token contributions is felt any less keenly by, or inflicts less grievously a wound upon the rights of, citizens of the United States who are in their minority.

A. Minors Possess First Amendment Rights of Freedom of Association and Speech.

If, as this Court has said, students do not "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969), then there can be no question that they possess those rights before they pass through those gates. Here, as with analogous contributions by their adult counterparts, the political contributions of minors are, at a minimum, an exercise of the constitutional right to political association. *Buckley*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression;" "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas") (citations and internal quotation marks omitted). For these minors, contributions to candidates and committees of political parties serve to express support for

and association with selected candidates and committees.[20]

The Government makes the novel argument, see FEC Jurisdictional Statement at 28, *FEC v. McConnell* (docketed May 15, 2003), that "any First Amendment interests that minors may have in participating in the financing of federal elections is substantially limited by the fact that minors have no constitutional right to vote in such elections." Unsurprisingly, the Government does not rely on any decision of this Court (or, for that matter, of any other court) for this proposition. It is insupportable and without merit.

While it is true that minors do not possess the right to vote, it is certainly true that they possess the right to freedom of speech and of association. And while it is true that minors do not possess the right to vote, it is just as true that they pay taxes on the income they earn. But Section 318 tramples these fundamental rights of every minor. Worse, the Government offers no limiting principle for the "standard" it applies to prevent the suppression of rights of expression in a variety of circumstances.

Absent such a limiting principle, unacceptable and unconscionable results are threatened in any case where a

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20. None of the special circumstances that this Court has found sufficient to justify governmental intrusion into the exercise of fundamental rights by minors is present here. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

government program or action affects selected groups or individuals, but leaves unaffected others who may, nonetheless, hold views or opinions that they would express about the Government's action. Women, for example, are not required to register for selective service. In this sense only, women are not affected by the registration requirement. By the Government's reasoning, then, Congress could suppress the speech and associational rights of a group of mothers of draft-eligible young men. Other examples clamor for attention. Men, for example, could be silenced in either their support for or opposition to abortion rights, because, after all, men cannot become pregnant. Anyone who is not the descendants of African Americans once held in involuntary servitude could be silenced on the question of whether a government program of reparations should be undertaken.

This unprincipled approach is dangerous for another reason. It confuses the fact of certain express constitutional dimensions of the right to vote with the larger aspirations of republican democracy. Then the Government uses that confusion as cover to justify the denial of other express, and fundamental, rights.

There are three express provisions in the Constitution respecting the right to vote. The Constitution guarantees the right of citizens to vote free from discrimination based on "race, color, or previous condition of servitude," U.S. Const. amend. XV, § 1, the right of citizens to vote in elections regardless of "failure to pay any poll tax or other tax," U.S. Const. amend XXIV, § 1, and the right of citizens aged 18 years or older to vote free from

discrimination "on account of age," U.S. Const. amend. XXVI, § 1. Oddly, perhaps, there is no express provision of the Constitution granting a generalized right to vote to citizens. But, because of the foregoing provisions, citizens cannot be turned away from the ballot box because of their race or color, poll tax evaders may vote if they please, and 18 year olds are not required to wait until they are 21 to vote in federal elections. These assurances of access to the vote as against certain previously enforced barriers are welcome indeed. In the Government's hands, however, they become the tools by which the right to freedom of speech and the right of association are deconstructed.

The Government's rationale fails to account for the terms of the First Amendment, which do not admit of an entire exception from protection for minors. Nor does the Government seek to square its approach with the decisions of this Court that have recognized that minors are persons in the constitutional sense and possess rights under the First Amendment. *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Tinker*. The Government ignores the certainty that even if minors are not protected from discrimination on the basis of *age* in voting, every federal election in this Nation still holds significance for them. The examples cited above, and a host of others readily drawn from the cases decided by this Court or the United States Statutes, adequately dispose of the simplistic "they can't vote so they don't count" approach taken by the Government.

B. There Is No Sufficiently Compelling Governmental Interest to Justify the Denial of Minors' Constitutional Rights of Speech and Association.

To discern whether Congress has gone *too far* in banning political contributions by minors, it is essential to ask what Congress sought to accomplish and to compare the purpose of Section 318 with its effect. Section 318 prohibits *all* contributions by *all* minors to *every* candidate for *every* federal office and to *every* committee of *every* political party. Section 318 does not simply prohibit parents of infants from surreptitiously evading their own donations limitations by the fiction of making contributions in the name of their infant sons and daughters. Section 318 bars 16 and 17 year old minors from making political contributions:

- even though they may no longer be subject to compulsory school attendance requirements
- even though they may no longer be required to obtain a worker's permit to obtain employment
- even though they are emancipated minors under State law
- even though they are enlisted members of the United States military, and
- even though their wages are subject to federal income taxation.

These are the effects of Section 318.

It is undisputed that Congress sought to address parental circumvention of donation limitations and channeling of gifts. In the court below, the Appellants offered various

justifications in defense of Section 318, including avoiding corruption and the appearance of it, assuring the legitimacy of the electoral system, preventing circumvention of campaign contribution limits, facilitating deterrence and detection of violations of federal campaign limitations, and restoring public faith in the system.

The concern about circumvention of donation limitations by wealthy parents using the names of their minor children – to which Senator McCain adverted on the Senate floor[21] – is unsupported by any substantial evidence.[22] Both Judge Henderson and Judge Kollar-Kotelly took note of the meagerness of the evidence supporting the need for Section 318. Judge Henderson found that "the government's evidence of corruption-by-conduit . . . remarkably thin . . . ." Supp. App. 463sa. Judge Kollar-Kotelly observed that the Government "failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental interest . . . ." Supp. App. 1009sa. In light of that failure, Judge Kollar-Kotelly concluded, "the minimal evidence presented does not establish that circumvention of campaign finance laws

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21. *See* nn. 8-9 , *supra* and accompanying text.

22. In his floor statement explaining Section 318, Senator McCain erroneously asserted that the FEC has reported a substantial problem in this area. *See* JA 1756-57, (FEC Responses to Requests to Admit, ¶¶ 19-20) (noting Senator McCain's error; admitting that the FEC has never asserted that "substantial evidence" of this problem exists).

by parents of minors supports the required governmental interest." Supp. App. 1011sa.

Even assuming that a remedy was needed for the unsubstantiated problems of parental circumvention and excess giving, Section 318 is unjustifiable. The ban on political contributions burdens substantially more political association and speech than necessary precisely because its proscriptions apply to individuals who have never engaged in prior unlawful behavior.

Minors' donations to committees and candidates embody classic exercises of the freedom of political association and the freedom of speech. No *valid* government interest supports this ban. Such a complete ban was not at issue in *Buckley*. Instead, because FECA permitted a contribution in some amount, this Court concluded that the ceiling on such contributions survived scrutiny. Here, Congress utterly prohibits even a token donation. That complete prohibition, to the contrary of the FECA *limitations* at stake in *Buckley*, encompasses so much speech and association unrelated to any regulable evil that it is "substantially broader than necessary to achieve the interests justifying it." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989).

Nor can concerns about abuses by a few parents, who might circumvent restrictions on their own donations by using their minor children as surrogates, justify a flat ban on contributions by all minors. Such circumvention is already illegal under FECA provisions predating BCRA and not challenged in this litigation. *See* Title 2 U.S.C. §§ 441a and 441f (2002). Moreover, the gift of money by a

minor need not come *from* parental sources or *at* parental direction. For example, Jessica Mitchell, one of the minor Appellees in this case, donated money to a candidate for the United States House of Representatives that she had earned from a small pet care business that she and a friend started in their neighborhood.[23] Each of the other minors, likewise, has monies that were not received as part of a scheme or plan of their parents to circumvent FECA's limitations on contribution amounts. Yet, donations by the minor Appellees are barred by Section 318.

In assessing the purported problem of parental circumvention of FECA restrictions, Congress operated largely in the dark. The record-keeping and reporting requirements of FECA do not require that the age of donors to candidates or committees of political parties be revealed.[24] Consequently, other than anecdotal information from newspaper articles of the bare handful of FEC Matters Under Review touching on this area,[25] Congress neither possessed nor sought out facts and

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23. *See* JA 583-34, 586-87, Declaration of Jessica Mitchell, ¶¶ 9, 22.

24. *See McConnell v. FEC*, No. 02-cv-582, Defendants' Opening Brief at 202 (D.D.C. *filed* Nov. 6, 2002) ("FECA does not require political committees to seek or report the age of contributors, the reports filed with the Commission do not reveal the number of contributions by children").

25. *See* Supp. App. 772sa-773sa, Findings of Fact ¶ 3.6 (Kollar-Kotelly, concurring) (citing newspaper articles).

statistics to shed light in this area.

As those anecdotal reports explain, donation reporting information frequently used the term "student" interchangeably with the term "minor" in response to the requirement that an employer be identified for donors.[26] The category "student" could not shed any light on the putative problem of parental circumvention of donations limitations for at least three reasons. First, as the FEC acknowledged below, an adult who is a student may identify themselves as a "student."[27] Second, as the FEC also acknowledged, not all persons identified as "students" on political donation reporting forms are minor children.[28] Third, not all minors are students, and thus, when making contributions may not list their occupations as students.[29] Consequently, this uninformative category, "student," used in describing conduit contribution activities in anecdotal newspaper reports relied on by Senator McCain suffered from the twin defects of being both under- and over-

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26. *See* Supp. App. 772sa-773sa, Findings of Fact ¶ 3.6 (Kollar-Kotelly, concurring) (citing newspaper articles).

27. *See* JA 1760-61, Responses of the FEC to Requests for Admission, ¶ 30 ("The Commission admits that certain adults whose occupation is that of student might choose to identify their occupation on a donation report as 'student'").

28. *See* JA 1761, Responses of the FEC to Requests for Admission, ¶ 31.

29. *See* Title 10 U.S.C. § 505 (2002) (authorizing the United States military to accept the enlistment of minors).

inclusive with respect to minors who make political contributions. The Government conceded this defect of the "student" category below.[30]

That Congress operated in the dark in assessing the problem and in crafting the solution cannot be surprising. The lack of evidence of a problem in this area was confirmed by the responses of the FEC and the United States to discovery in the trial court. Despite having "made a reasonable inquiry," the FEC and the United States were each unable to find any information in their possession sufficient to allow them to admit or deny that any "present member of Congress and other elected federal officer ha[d] engaged in any corrupt act as a result of contributions by minors . . . ."[31] Nor could they find any information in their possession sufficient to allow them to admit or to deny that any "present member of Congress or any other elected federal officer has an appearance of corruption as a result of contributions by minors to candidates or contributions or donations by minors . . . ."[32] And, although preventing corruption and

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30. *See McConnell v. FEC*, No. 02-cv-582, Defendants' Opening Brief at 202 n. 140 (D.D.C. *filed* Nov. 6, 2002).

31. *See* JA 1762-63 (Response of FEC to Requests to Admit, ¶ 41; JA 1786-87 (Response of the United States to Requests to Admit, ¶ 41).

32. *See* JA 1763 (Response of FEC to Requests to Admit, ¶ 42; JA 1787 (Response of the United States to Requests to Admit, ¶ 42).

the appearance of corruption have been identified as a goal of the BCRA, and of Section 318, in responding to discovery below, the FEC asserted that the terms, "any corrupt act" and "an appearance of corruption" are vague.[33]

Oddly absent from the justifications proffered by the Appellants below is any assertion that money from minors is, in its essence, corrupting or evil. In fact, the proffered justifications exclusively focus on the alleged abuses of parents, which abuses already are directly prohibited by FECA. Moreover, the Government's interest in preventing corruption or the appearance of corruption is no greater (and arguably much less) with respect to minors than with respect to adults. Obviously, it is not the view of Congress that *any* donation in *any* amount is *per se* corrupting. Were that the case, all donations would be proscribed.

Plainly, the interest in preventing parents from circumventing contribution limits by channeling additional contributions through their children is not sufficiently compelling to justify Section 318.

C. Section 318 Is Not Narrowly Drawn to Serve the Asserted Governmental Interest.

Two aspects of Section 318 are of particular import to an appropriate constitutional analysis of the fit between the asserted government purposes for the ban and the means chosen to serve them.

First, the ban applies to individual minors even though

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33. *See* JA 1762-63 (Response of FEC to Requests to Admit, ¶¶ 41-42.

their exercise of associational expression and free speech has not threatened the Government's interests. These minors are barred from expressing their association with candidates and committees by even symbolic, token donations despite the utter lack of evidence of subversion or corruption, or of their being used by their parents or guardian for that purpose. The ban applies to *all* donations by *all* minors even though there is no reason to conclude that such donations, taken individually or in the aggregate, either by their nature or practice, injures to relevant government interests.

Second, unlike the direct bans on giving contributions in the name of another, 2 U.S.C. § 441f (2002),[34] and on exceeding limitations on contribution amounts, 2 U.S.C. § 441a(a)(1)(A),[35] the ban on contributions by minors is a *prophylactic* suppression of constitutionally protected rights of minors. As this Court has admonished, however,

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34. Title 2 U.S.C. § 441f provides:

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

35. Title 2 U.S.C. § 441a provides, in pertinent part:

Except as provided in subsection (i) and section 315A, no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ 2,000 . . . .

"broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 458 (1963).

In *Buckley*, of course, this Court upheld personal contribution *ceilings*, not a complete ban. A *ban* on such gifts could not, however, pass muster. In fact, one of the justifications offered in *Buckley* for a contribution ceiling was that a ceiling left donors free to make some donation:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution.

424 U.S. at 21. A *ban* that entirely prevents a minor from giving "to a candidate or campaign," does not "permit[] the symbolic expression of support evidenced by a contribution."

(1) When First Amendment Freedoms are at Risk, The Constitution Demands that Congress Draw its Legislative Solutions Narrowly

What is called for in this analysis is an examination of the fit between purpose and means. For example, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court upheld an ordinance that prohibited the posting of signs on public property, but only after concluding that the ordinance "responds precisely to the substantive problem [of visual blight] that concerns the City." That cannot be said of the contribution ban; it closely resembles the anti-littering law struck down in *Schneider v. State*, 308 U.S. 147 (1939). There, as here, the state "could have addressed the substantive evil

without prohibiting expressive activity," or adopting a "prophylactic rule." *Taxpayers for Vincent*, 466 U.S. at 810. Similarly, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), also assume a fit between means and ends that is lacking here. Thus, in *Ward*, an ordinance requiring that city employees operate sound amplification equipment was upheld because it directly advanced the city's interest in controlling noise. 491 U.S. at 800. Likewise, in *Clark*, a regulation barring protesters from sleeping in a park was upheld because it "narrowly focused on the Government's substantial interest in maintaining the parks in the heart of our Capitol in an attractive and intact condition." 468 U.S. at 296.

(2) The Court Below Correctly Concluded that Section 318 was not Narrowly Drawn

These cases all show that Congress must craft its statutes narrowly when touching upon constitutional rights, and must limit itself to interests unrelated to the suppression of expression. *Buckley*, 424 U.S. at 17-18. Below, the Appellants identified the interests supposedly served by the statute. Unfortunately, the ban is not closely drawn to promote those interests. Instead, it focuses directly on expressive activities. It thus burdens substantially more speech than necessary to accomplish the state's goal and cannot be sustained.

The interests identified by the Appellants go to abuses by persons other than minors. But the ban targets constitutional exercises by minors. Consequently the ban does not target the "evil" – namely, circumvention or

corruption – that motivated Congress to enact it. *Cf. Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil"). Of course, Congress can address circumvention and corruption problems directly; indeed, it already has done so with its enactment of 2 U.S.C. §§ 441a and 441f (2002).

Neither the minor Appellees nor their parents have challenged those existing provisions of FECA. Those restrictions directly serve the interests that are, at best, only obliquely served by Section 318's ban on political contributions by minors. Instead, the minors' ban goes further and in a different direction entirely. Section 318 prohibits minors' political contributions, even when such contributions are not made in circumvention of FECA's contribution limits. It prohibits contributions of emancipated minors. It prohibits contributions by orphaned minors. And it prohibits contributions of those minors who, with consent of their parents, have enlisted in the United States Armed Forces.[36]

The Government asserts that Congress merely drew a line in choosing the ages to be affected by the ban embodied in Section 318. *See* FEC Resp. at 8 n.3. To buttress its claim, the Government invokes *Buckley*'s teaching that the Court will respect lines drawn by Congress in this area. *Id.* (quoting *Buckley*, 424 U.S. at 83

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36. *See* Title 10 U.S.C. § 505 (2002) (authorizing enlistment of minors).

n.111). The *Buckley* language appropriated by the Government expressed this Court's view of the deference due to Congress' judgment about where to draw a line that still left contributors free to make donations in some amount, even in not as large as they might have preferred. That is not the case here. Section 318 is not a "cap." It is a ban. *See* FEC JS at 9 n.4 (describing ban as absolute). The Government invokes no decision of this Court to support its presumption that this Court will treat as "mere line drawing" a decision by Congress to abrogate wholesale constitutional rights of citizens.

These minors "are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *FEC v. National Conservative PAC*, 470 U.S. 480, 501 (1985). The First Amendment freedoms put in jeopardy by Section 318 are supremely precious. This Court has explained, "because First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). While this Court has instructed that "[p]recision of regulation must be the touchstone" when regulating activities protected by the First Amendment, Section 318 lacks that precision and instead broadly bans the exercise of pristine constitutional freedoms.

(3) The Failure of Congress to Draw this Provision Narrowly is Attested to by the Wide Variety of Alternatives That are Drawn Narrowly to the Asserted Interests

Ready and less burdensome alternatives exist to ensure

that current election laws are not manipulated by a few parents who use their guardianship to channel funds through their minor children. In fact, the FEC never recommended such a ban to Congress, preferring instead to suggest less drastic means.[37] Going beyond the all-or-nothing approach of the ban, Congress could have established a family contribution cap or employed a rebuttable presumption regarding the voluntariness of minors' contributions. In fact, Congress could have required the FEC and the Attorney General to enforce the current restrictions.

(4) Congress Could Have Succeeded in Drawing its Provision Narrowly by Following One of the Varied Approaches Taken by the Several States.

In addition to the less burdensome approaches we suggest, the "real world" experience of the States suggests that ready, less burdensome, and more precisely drawn alternatives exist to serve any interest at stake. Several of the States have undertaken such less burdensome regimens of regulation. Under those regimens minors continue to make donations *and* the putative harms of circumvention and corruption are avoided by less draconian means. At least fourteen States have enacted less cumbersome and prohibitive regimes for the regulation of political donations by minors to candidates for state election. The variety of approaches reflects the Founders' genius for

37. *See supra* nn. 5-7 and accompanying text (discussing Annual Reports and FEC recommendations for legislation).

separate sovereignties and demonstrates the clumsy carelessness evinced by Section 318.

(a) West Virginia

One State, West Virginia, allows political contributions by minors subject to the same cap as applies to the donations of adults. *See* W. Va. Code § 3-8-12 (2002). As under federal law prior to the enactment of Section 318, West Virginia only requires that the minor acts knowingly and voluntarily, that the funds donated be under the minor's exclusive ownership and control, and that the funds are not derived from a gift made for the purpose of contribution. *Id.*

(b) Alaska

Another State, Alaska, has enacted a statute that directly and precisely addressed the problem of conduit giving by parents through their minor children. *See* 2 Alaska Admin. Code § 50.258 (2002). Under that provision, a minor is barred from making a contribution of money or other valuables if the funds or goods were given to the minor by the parent for the purpose of that contribution. *Id.*

(c) Connecticut, Florida, Kentucky, and Massachusetts

Four States – Connecticut, Florida, Kentucky, and Massachusetts – impose a separate cap on the amount of money that minors may contribute. *See* Conn. Gen. Stat. § 9-333m (2001) (minors under 16 limited to $ 30 per year in contributions); Fla. Stat. § 106.08 (2002) (unemancipated minors under 18 limited to contributions of $ 100 per candidate or political committee); Ky. Rev.

Stat. Ann. § 121.150 (minors' contributions may not exceed $ 100); Mass. Ann. Laws ch. 55, § 7 (2002) (minors under age 18 limited to $ 25 per calendar year). Under each of these provisions, a minor remains free to engage in the symbolic act of giving that this Court recognized in *Buckley* to be an exercise of the fundamental right of association. The choice of smaller amounts, while respecting the constitutional exercise at stake, reflects a better choice, and one consistent with the Constitution.

(d) Arizona, Arkansas, Hawaii, Kansas, Michigan, Oklahoma, South Carolina, and Texas

Eight States – Arizona, Arkansas, Hawaii, Kansas, Michigan, Oklahoma, South Carolina, and Texas – demonstrate their respect for the constitutional rights at stake in the act of making political donations *and* their appreciation for the possibility, however remote, that some parents may make conduit contributions through their children. By various approaches, these States *allow* minors to make political donations. The amounts of those donations are included in calculating the total contributions, either of a particular parent or of a family unit. *See* Ariz. Rev. Stat. § 16-905 (2001) (contributions of an unemancipated minor treated as contributions from parents); Ark. Code Ann. § 7-6-205 (2002) (attributing amount of contribution by dependent child to the parent when the parent has provided funds for the purpose of making such a contribution); Haw. Rev. Stat. § 11-204 (2002) (minors may contribute in their own name, but the amount of the contribution counts in calculating the total

contributions of the minor's parent or guardian); Kan. Stat. Ann. § 25-4153 (2001) (unemancipated children under 18 years of age may make contributions but the contributions are treated as made by the parent or parents of such children); Mich. Comp. Laws § 169.253 (2002) (dependent minors may make contributions and have them reported in their name but the amount of such contributions is attributed to the parent or guardian for purposes of compliance with contribution limitations); 21 Okla. Stat. § 187.1 (2002) (contribution limits treat donations by husband, wife and all unemancipated children under the age of 18 in the aggregate as a single family unit); S.C. Code Ann. § 8-13-1330 (2001) (contributions by unemancipated minors under 18 years of age are treated as contributions by their parents); Tex. Elec. Code Ann. § 253.158 (2002) (children under age of 18 permitted to contribute but the donation is treated as the contribution of the parent or guardian).

D. The Judgment Below Comports with This Court's Decision in *FEC v. Beaumont*.

The judgment that Section 318 is unconstitutional comports entirely with this Court's recent decision in *FEC v. Beaumont*, 2003 U.S. Lexis 4595 (U.S. June 16, 2003).[38]

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38. Unlike the ban on political contributions by corporations, the application of which to nonprofit advocacy corporations was at stake in *Beaumont*, Section 318 is, in fact, a complete ban on money donations by individuals who are in their minority. For this reason, unlike the challenge brought by a nonprofit advocacy corporation in *Beaumont*, this Court should apply strict scrutiny in

In *Beaumont*, this Court concluded that the ban on direct corporate political contributions applied to nonprofit advocacy corporations, and survived constitutional scrutiny. 2003 U.S. Lexis 4595, *7 ("We hold that applying the prohibition [on corporate contributions directly to political candidates] to nonprofit advocacy corporations is consistent with the First Amendment"). To the point, *Beaumont* reaffirmed the so-called *Buckley* intermediate level of scrutiny, concluding that the corporate direct contribution ban passed muster because it was closely drawn to match a sufficiently important interest. *Beaumont*, 2003 U.S. Lexis 4595, *29-*33. This Court rejected an argument that the corporate contribution ban was not closely drawn, concluding that the argument incorrectly characterized federal law as completely prohibiting corporate political contributions. *Id.* Importantly, in *Beaumont*, this Court noted that within the larger category of political contributions, corporate contributions were further from the heart of the First Amendment than those of individuals:

> Within the realm of contributions generally, corporate contributions are furthest from the core of

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its analysis of the ban on contributions by minors. As demonstrated within, *see* Argument IV, *infra*, Section 318 cannot survive strict scrutiny. Judge Leon below concluded both that strict scrutiny applied for this reason and that Section 318 failed such scrutiny. *See* Supp. App. 1177sa (Leon, J., concurring) (discussing *Buckley* and the application of strict scrutiny to flat bans on contributions).

> political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, . . . and of the public in receiving information . . . . A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.

Beaumont, 2003 U.S. Lexis 4595, *30 n.8 (citations omitted). Of course, Section 318 does not leave individual minors "free to make their own contributions."

In reaching their conclusion that Section 318 of BCRA was unconstitutional, Judges Henderson and Kollar-Kotelly concluded that it was unnecessary to resolve the question whether Section 318 was subject to strict scrutiny because the statute failed scrutiny under *Buckley*. Instead, Judges Henderson and Kollar-Kotelly concluded that there was not a sufficiently important interest at stake. And they concluded that evidence gathered by the Government to buttress the enactment of Section 318 was either "minimal" or "remarkably thin." Thus, they found that the flat ban on contributions was not narrowly drawn to the asserted interest in averting parental subversion of contribution limits. As demonstrated by their opinions, Section 318 could not survive even relatively "complaisant review under the First Amendment," *Beaumont*, 2003 U.S. Lexis 4595, *29.

Congress did not enact Section 318 to respond to any allegedly corrupting influence resulting from political contributions by minors. In the Government's view,

Section 318 was enacted to address the potential evasion of contribution limits by parents through the device of making contributions in the name of minor children. *See* FEC JS at 28 ("Section 318 is a valid means of preventing adults from circumventing FECA's contribution limits by making surrogate contributions through minors under their control"). The ban on corporate campaign contributions, however, reflected the well-founded concerns of Congress regarding the corrupting influences of such contributions. *See* 2003 U.S. Lexis 4595, *12-*20 (discussing advent and history of corporate contributions limitations).

As this Court explained in *Beaumont*, federal laws have barred direct corporate contributions for nearly a century, and since that original enactment, Congress has continued to attend to the problem of the corrupting potential of corporate contributions by strengthening and improving the prohibition on such contributions. *See Beaumont*, 2003 U.S. Lexis 4595, *14-*16 (discussing legislative developments related to prohibitions on corporate contributions). In complete contrast, here, there is neither a claim nor the evidence supporting such a claim that political contributions by minors constitute the particular source of a corruption or distortion of the federal election process. Nor is there a history of Congress attacking the problems of that fictional corruption. Section 318 bars all political contributions by all minors – not because of a well-recognized and long-known problem of corruption resulting or being threatened by such donations – but because Congress chose to abrogate the constitutional rights of *all* minors rather than demand that the FEC and

the Department of Justice enforce existing laws against known malefactors.

Instead, as the Government would have it, some parents will use their status as guardians of their minor children to direct contributions to candidates or committees. FEC JS at 28. In turn, the Government believes, the use of such conduit contributions will allow such parents to exceed the individual contribution limitations. *Id.* Thus, as the Government has always argued this point, the purpose of Section 318 is to address a category of abuses by parent-donors, not to cure a problem of corruption or distortion that is inherent in donations from minors.

Moreover, the ban on corporate contributions effectively prevents the earnings of corporations from being transformed into political "war chests," thereby avoiding "corruption or the appearance of corruption." *Beaumont*, 2003 U.S. Lexis 4595, *16-*17 (discussing *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). No comparable threat emanated from the political donations of minors, which donations were, after all, subject to the same cap applicable to all other individuals.

Prior to the effective date of Section 318, minors were subject to precisely the same contribution limitations as others. *Buckley* affirmed that limitation, and this Court concluded that Congress acted within reason in allowing contributions while capping their amounts. Section 318 stands in stark contrast to that reasonable approach.

The corporate contribution ban is also directed to the service of other interests that are not at stake when minors

make political contributions. Chief among those interests is protection of those individuals who have paid money into a corporation or union for other purposes, insuring that the money they have paid in for other reasons is not converted into support for political candidates to whom they may be opposed. *Beaumont*, 2003 U.S. Lexis 4595, *17-*18. Section 318 does not serve any comparable purpose. As the evidence in this case demonstrated, Section 318 prevents minors who have earned their own money from giving it to candidates of their choosing. No pockets are picked, as it were, when minors donate money they have earned by working as a church secretary[39] or from selling home-made crafts.[40]

Finally, in *Beaumont*, this Court concluded that while the provision in dispute barred direct contributions, the ban on donations by corporations was not a complete prohibition on donations. This Court reasoned that the ban was not complete because corporations were permitted to establish and pay the administrative expenses of PACs that, in turn, can make such contributions. *Beaumont*, 2003 U.S. Lexis 4595, *32 ("NCRL is simply wrong in characterizing [the provision] as a complete ban .... The PAC option allows corporate political participation

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39. JA 411 (Declaration of Hannah McDow, ¶25) ("I work as a secretary in the office at our church, and have income regularly from that job").

40. JA 415 (Declaration of Isaac McDow, ¶24(b)) ("I make small Christmas crafts and sell them").

without the temptation to use corporate funds for political influence").

In contrast here, Section 318 is admittedly a complete prohibition, *see* FEC Resp. at 9 n.4 (describing Section 318 as imposing an "absolute ban on campaign contributions by minors"). Worse, while this Court has rejected the claim that "regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions," *Beaumont*, 2003 U.S. Lexis 4595, *33, there is no cognate activity available to minors that this Court has concluded equates so closely with contributions that it renders the prohibition in Section 318 as something less than complete. Thus, unions and corporations – including nonprofit advocacy ones such as in *Beaumont* – have an outlet for their expressed desire to support candidates and committees of political parties, by establishing and paying the expenses of PACs. But Congress has stripped from minors their right to make political contributions without any similar other avenue that this Court has passed upon as not imposing excessive regulatory burdens.

II. THE VOIDABILITY OF MINORS' GIFTS DOES NOT JUSTIFY SUPPRESSING MINORS' CONSTITUTIONAL RIGHTS

The FEC asserts that the right of minors to rescind a gift provides a basis for concluding that Section 318 is constitutional. *See* FEC Resp. at 4 and n.2. The FEC asserts that the common law incapacity of a minor results

in a rule the logic of which dictates that

> a minor who contributed money to a candidate for federal office might retain the right to 'disaffirm' the contribution and to insist upon the return of the funds at any time before he reached majority if (for example) he became dissatisfied with the candidate's performance during the campaign or in office.

Id. That contention is flawed for at least two reasons. First, there is nothing in BCRA – not in its text nor its legislative history – to indicate that donation rescission concerned the Congress at all. Second, the FEC's argument fails to account for the fact that the right to hold an opinion and to express it to others serves no valid function in a democracy if persuasion cannot be followed by conversion.[41] Thus, the fact that a minor chooses to support a candidate one day, and changes her mind the next, perhaps in response to new information about the positions taken by the candidate on issues of public policy, cannot be the basis for denying a constitutional right.

There are now, and have been for many years, two forms of equivocation in political alignment and support that are directly relevant to the questions raised by the

41. Even this Court reserves to itself the prerogative of changing its mind. *See Lawrence v. Texas*, 2003 U.S. Lexis 5013, *35-*36 (U.S. June 26, 2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); 2003 U.S. Lexis 5013, *35-*36 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled").

FEC's claim. First, there are the cases of politicians, office-holders and office-seekers, who switch political parties. Second, there are the cases of candidate endorsements made and withdrawn.

Both of these practices affirm the healthy volatility of the political process in our Nation. On this practical level, the Nation has witnessed and welcomed a steady train of party-switching and endorsement-withdrawal. Indeed, the present membership of the United States Congress includes six members, three in each House, that have exercised this cherished right to change political affiliations.[42] In fact, "party-switching" has a venerable history.[43] Nor is party-switching limited to members of

42. Present members of Congress that have changed party affiliations are: James Jeffords of Vermont; Ben Nighthorse Campbell of Colorado; Richard Shelby of Alabama; Virgil Goode of Virginia; Billy Tauzin of Louisiana; and, Nathan Deal of Georgia. *See Inside Politics: Party Switchers, Past and Present,* http://www.cnn.com/2001/ALLPOLITICS/05/23/switchers.list; *Biographical Directory of the United States Congress,* http://bioguide.congress.gov/biosearch/biosearch.asp.

43. Senators Bob Smith of New Hampshire; Phil Gramm of Texas; Harry Byrd Jr. of Virginia; Strom Thurmond of South Carolina; Wayne Morse of Oregon; Henrik Shipstead of Minnesota; George Norris of Nebraska; Robert La Follette Jr. of Wisconsin; Miles Poindexter of Washington; Fred Dubois of Idaho; Frank Cannon of Utah; Richard Pettigrew of South Dakota; Lee Mantle of Missouri; Henry Teller of Colorado; John P. Jones of Nevada; and, William M. Stewart of Nevada. Representatives Matthew Martinez of California; Michael Forbes of New York;

Congress.[44]

Moreover, beyond party realignment, the practice of making and then withdrawing an endorsement is well-known.[45] Both acts – expressing support for a candidate

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Jimmy Hayes of Louisiana; Mike Parker of Mississippi; Greg Laughlin of Texas; Tommy Robinson of Arkansas; Bill Grant of Florida; Andy Ireland of Florida; Phil Gramm of Texas; Eugene Atkinson of Pennsylvania; and, Bob Stump of Arizona. *See Inside Politics: Party Switchers, Past and Present,* http://www.cnn.com/2001/ALLPOLITICS/05/23/switchers.list; *Biographical Directory of the United States Congress,* http://bioguide.congress.gov/biosearch/biosearch.asp.

44. Other notables include Ronald Reagan and Justice Joseph Story and at least three Governors, Mike Foster of Louisiana, George Hoadly of Ohio, and, John Connally of Texas. *See* Encyclopedia Americana: *Ronald Reagan* http://gi.grolier.com/presidents/ea/bios/40preag.html; R. Kent Newmyer, *Supreme Court Justice Joseph Story*, 71 Cornell L. Rev. 726, 728 (1996); Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 Tulsa L.J. 59, 112-13 (2000); Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 Law & Soc. Inquiry 459, 497 n.7 (1997); Marianne Means, *Parties Reward Converts; Voters Don't*, South Coast Today, http://www.s-t.com/daily/04-96/04-15-96/5convert.htm.

45. Recent examples abound. *See* Jim Tharpe, *Abortion Foes Split On Chambliss*, Atlanta Journ. and Const., October 22, 2002, at 5B (Georgia pro-life organization withdraws support for Senate candidacy of Saxby Chambliss); Frank Bruni, *Gary Condit Is Still Running*, N.Y. Times, February 17, 2002, § 6, at 30

and changing one's mind and withdrawing that support – embody the exercise of constitutional rights of freedom of speech and association. In fact, those acts are indistinguishable in effect from the voidability of minors' gifts that so troubles the FEC here. Without the right to express a change in views, the right to hold an opinion and to express it to others is of doubtful value. While it is true, as Justice Holmes famously explained, "every idea is an incitement," the application of that constitutional *bon mot* commands the liberty to change one's mind, to withdraw previously pledged support, and to communicate one's change of heart or mind to others:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence

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(Representatives Nancy Pelosi and John Kasich withdraw their endorsements of Gary Condit); B. Drummond Ayres, Jr., *Campaign Briefing*, N.Y. Times, June 6, 2000, § A, at 21 (Teamsters Union withdraws endorsements of Lois Capps and Tom Sawyer over the China trade bill); *Inside*, N.Y. Times, February 14, 2000, § A, at 1 (Guy Molinari withdraws support for George W. Bush); Wayne King, *Anti-Florio Fever Is Giving Headache to a Democrat*, N.Y. Times, October 27, 1990, § 1, at 25 (the Women's Political Caucus of New Jersey withdraws endorsement of Dan Mangini over his stance on abortion).

> may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

Gitlow v. New York, 268 U.S. 652, 673 (1925).

The FEC is wrong, plain and simple. As the FEC acknowledges, the common law approach did not treat gifts by minors as *void* but merely *voidable*. FEC Resp. at 4 n.2. The common law voidability of a minor's gift does not present a ground for suppressing the constitutional rights of expression and association that are evinced by the contributions of minors. Not unless the right of candidates to change parties justifies a federal law prohibiting persons who change their minds from holding office. Not unless the right of political endorsers to withdraw their endorsements justifies a federal law suppressing freedom of political expression.

III. THE BAN ON CONTRIBUTIONS BY MINORS IS OVERBROAD.[46]

Judge Henderson correctly concluded that Section 318 is unconstitutionally overbroad. Supp. App. 465sa. Section 318 prohibits *every* contribution of money by *every* minor to *every* candidate for *every* federal elective

46. This separate ground for affirmance is fully supported by the record.

office and to *every* committee of *every* political party. The ban – the "absolute prohibition" as the FEC describes it, *see* Response of FEC to Joint Motion at 9 n.4 – is quite broad.

Unlike 2 U.S.C. §§ 441a and 441f, which precisely target conduit giving and excess contributions, Section 318 fails to narrowly focusing on the problem of conduit contributions by parents and guardians through their minor children. The ban demonstrates no facile sensitivity in its casting at all. Caught up alike in the Government's net are the young Democrats, the young Libertarians, and even the young Republican whose work in her own pet sitting service makes possible small donations to congressional candidates.[47] True enough Section 318 prohibits those donations, few in number by the Government's own admission, that are directed by their parents and violated existing law before the adoption of Section 318.

This same dragnet sweeps in the servicemen and women who defend our Nation while still in their minority, 10 U.S.C. § 505 (2002). Even *emancipated* minor females – whose judgments about such life and death matters as abortion are bound to be respected by the law – are treated like infants. *But see, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 507 (1990) (affirming constitutionality of Ohio law criminalizing abortions performed on *unemancipated* minors, except in circumstances comporting with the constitutional requirements). Minors – such as these Appellees – who

47. *See* JA 586-87 (Declaration of Jessica Mitchell, ¶ 22).

possess independence of judgment and separate financial means to make such donations fall prey to Section 318.[48] This ban is not limited to parents or guardians with a history of bad conduct; it assumes that no minor is to be trusted not to abuse his or her rights.

This is a case of *inherent* overbreadth. Section 318 does not take aim at a suspect behavior and have the unfortunate side effect of collateral damage to constitutionally protected conduct: "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Secretary of State v. J. H. Munson Co.*, 467 U.S. 847, 865-66 (1984). *See id.* at 864-65 (in case of *inherent* overbreadth, the more demanding "substantial overbreadth" test does not apply).

This ban "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of [constitutional] freedom[s]." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Such an "overbroad" law "directly restricts protected expressive activity and does not employ means

48. The view that categories of minors possess judgmental maturity and independence of judgment animated Congress when it enacted the Equal Access Act of 1984, Title 20 U.S.C. § 4071, *et seq*. *See Westside Comm. Schools v. Mergens*, 496 U.S. 226, 250-51 (1990) (discussing judgmental maturity of minors and congressional determination regarding it). Unsurprisingly, experts in adolescent psychology and development affirm the important developmental value of inclusion in the political process. *See* Brief Amicus Curiae of David Moshman Supporting Minor Appellees.

narrowly tailored to serve a compelling governmental interest." *Munson*, 467 U.S. at 965 n.13. The ban flies in the face of established doctrine: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (internal quotation marks and citation omitted).

IV. SECTION 318 VIOLATES THE MINORS' RIGHTS TO EQUAL PROTECTION.[49]

Section 318 also violates these Appellees' rights to equal protection guaranteed to them by the Fifth Amendment Due Process Clause. The ban on political contributions selects out those who are less than eighteen years of age. Section 318 then subjects those selected out to special disabilities with respect to their exercise of constitutional rights of expression and association. Put another way, a minor's exercise of fundamental First Amendment rights is differentially burdened, in an unjustifiable manner, because of age.

Because Section 318 burdens the exercise of fundamental rights in this way, it is subject to strict scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting use of strict scrutiny for "classifications based on race or national origin and classifications affecting fundamental rights"). Of course, Section 318 fails even the more complaisant First Amendment analysis called for in *Buckley*. Consequently, because it cannot

49. This separate ground for affirmance is fully supported by the record.

pass muster under the more rigorous standards discussed in the preceding sections, it fail constitutional analysis under strict scrutiny.

CONCLUSION

The judgment of the District Court – holding that Section 318 of the Bipartisan Campaign Reform Act unconstitutional – should be affirmed.

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